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No. 02-658

In the

Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Clean Air Act, can the EPA override a State permit decision when the State is authorized to carry out its own air pollution program and the permit does not violate any federal standard?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. PLF was founded in 1973 and provides a voice in the courts for mainstream Americans who believe in limited government, individual rights, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast.

In its fight to protect fundamental constitutional rights, PLF becomes involved in cases that raise important public policy considerations that may create significant legal precedents. Amicus participation is approved by a voluntary Board of Trustees where PLF's perspective will assist the Court in resolving the underlying legal issues. PLF supports a broad view of the public interest and promotes balance and common sense in the administration of laws and regulations.

There is an alarming trend among federal agencies and the courts to expand the enforcement power of the federal government by adopting statutory interpretations that cannot be squared with the plain meaning of the act, the intent of Congress, or constitutional principles of federalism. This case is a singular example of government overreaching.

The Ninth Circuit has held that the EPA may override a discretionary permit decision of a State, under a federally-

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

approved state air pollution program, without a showing that the decision will violate any federal air pollution standard. If it stands, the Ninth Circuit opinion will undermine state and federal cooperation—an essential ingredient in addressing the Nation's goals for cleaner air—and nullify the enforcement power of the States as recognized by the Clean Air Act (CAA).

PLF has a long history of amicus participation in environmental cases before this Court. For example, PLF was an amicus participant in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Bennett v. Spear*, 520 U.S. 154 (1997); *Douglas County, Oregon v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). PLF believes its public policy perspective will provide a necessary viewpoint in this case.

STATEMENT OF THE CASE

Teck Cominco Alaska, Inc. (Cominco) owns and operates a mine, known as the Red Dog Mine, in the State of Alaska in partnership with the Northwest Arctic Native Association on Association property. The mine lies 100 miles above the Arctic Circle in a remote part of the state and is the largest zinc concentrate producer in the world. The closest residential communities are the native villages of Kivalina and Noatak. The mine is the largest private employer in a vast area with an historically high unemployment rate. Power for the mine, which operates continuously, is provided by the mine's six diesel-driven electric generators. To increase production, in 1998 Cominco proposed the addition of a new generator. The State of Alaska is an "attainment" or clean air area for nitrogen

oxide (NOx) and because this generator would increase NOx emissions, Cominco was required to obtain a Clean Air Act permit known as a PSD (Prevention of Significant Deterioration) permit. PSD permits are available from the Alaska Department of Environmental Conservation (ADEC) under the State's EPA-approved clean air program. As a permit condition, new sources of NOx emissions must be equipped with BACT (best available control technology) to minimize pollutants. BACT is defined as:

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this act emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.

42 U.S.C. § 7479(3).

One option for BACT involved the use of Selective Catalytic Reduction, or SCR, on the new generator. SCR is a process involving injection of ammonia or urea into the exhaust and combining with a catalyst to ensure more complete combustion. However, ADEC concluded that the cost of SCR was excessive—$2.9 million in capital costs and nearly $635,000 in annual operating expenses. As an alternative, Cominco proposed installing "Low NOx" controls on *all* of its generators, not just the one subject to permitting. This method relies on high-combustion air temperatures to atomize toxic particles and reduce NOx emissions. ADEC determined that this technology was more cost effective than SCR and the use

of "Low NOx" on *all* the generators would reduce overall emissions from the mine more than SCR on the new generator. In 1999, ADEC designated "Low NOx" controls as BACT and issued Cominco a PSD permit.

Only after the close of the comment period did EPA express its disagreement with ADEC's BACT determination ordering ADEC to require the use of SCR on the new generator. Since SCR had never been required as BACT for this type of generator, was less cost effective than "Low NOx" controls, and could result in more overall emissions, ADEC refused to modify its permit. As a result, EPA ordered Cominco not to operate the new generator. Cominco and ADEC then filed suit in federal court for a determination of whether the EPA has unilateral authority to override the State's discretionary BACT determination. In July, 2002, the Ninth Circuit held that the EPA *can* override a state's BACT determination. The State of Alaska has now petitioned the case to this Court.

INTRODUCTION

This is apparently the first case in which the EPA has invaded a state's enforcement authority and vetoed a state BACT determination. Until now, EPA has deferred to the States as the CAA requires. This case represents a dangerous precedent related to EPA oversight of state air pollution programs and changes the standard for BACT. EPA has consistently maintained that BACT requires a consideration of the type of emission controls used in similar situations and the economic efficiency of the controls imposed. But in this case, the BACT imposed by EPA is unique (i.e., Selective Catalytic Reduction has never been required for a generator of the type used at the mine) and the EPA is now asserting that the economic efficiency of the controls is irrelevant to a BACT determination if the company has the financial ability to

implement the more costly emission controls. Moreover, the Ninth Circuit opinion has created a conflict with the decisions of this Court and other circuits.

This case is important for other reasons as well. With increasing frequency, EPA is interfering with state enforcement efforts under a number of federal environmental statutes. In addition to the CAA, states may implement their own programs under the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA). These state programs must be equal to, or more stringent than, the corresponding federal law and the state programs must be approved by the EPA. But, the Agency still overrides state permit decisions and files duplicative federal suits against polluters because the EPA is dissatisfied with the conditions imposed or the penalties sought. This has bred distrust between state and federal enforcers and has generated uncertainty among the citizens in the regulated community who cannot rely on their dealings with state officials so long as the EPA claims it can invalidate state enforcement decisions. In addition to the present CAA case, this Court will be asked in the current term to consider an RCRA case where the EPA has interfered with a state's enforcement effort. That case is *Power Engineering Company v. United States*, 303 F.3d 1232 (10th Cir. 2002).

On November 14, 2002, this Court granted an extension of time to Pacific Legal Foundation (amicus in this case) to file a Petition for Writ of Certiorari in *Power Engineering* to January 17, 2003 (Application No. 02A393). In that case, the EPA filed a federal suit to require certain financial assurances from Power Engineering after the State had already settled its dispute and had won $1.2 million in penalties from the company. Under RCRA, "[a]ny action taken by a state under a hazardous waste program . . . shall have the same force and effect as action taken by the Administrator [of the EPA]" 42 U.S.C. § 6926(d). However, the EPA claims it has unilateral authority to enforce RCRA notwithstanding the state program.

Clearly, then, the present case is not an isolated incident, nor is the issue of EPA authority in light of a state authorized enforcement program limited to the CAA. Although these federal environmental laws have different statutory provisions defining the federal-state relationship, they all vest authority in the State to pursue its own enforcement strategy. Whether the EPA can interfere with that strategy, thereby breeding distrust and uncertainty, is an important federal question warranting definition by this Court. Therefore, this Court should grant the Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

An objective of the Clean Air Act, as with similar environmental laws, is to establish a viable federal-state partnership in the Act's implementation. This is essential to achieving the statutory goals of a cleaner and safer environment. However, the EPA's practice of undermining state enforcement decisions generates distrust, creates uncertainty, and generally defeats attempts at meaningful cooperation between state and federal officials. The EPA's practice of interfering with state enforcement efforts also wastes state and federal resources, conflicts with the historical role of states in dealing with local environmental problems as recognized by the CAA, and is counterproductive.

ARGUMENT

I

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW AUTHORIZES EPA TO USURP THE ENFORCEMENT ROLE ASSIGNED TO THE STATES UNDER THE CAA WHICH UNDERMINES THE FUNDAMENTAL CONCEPT OF FEDERAL AND STATE COOPERATION EMBODIED IN THE ACT AND NULLIFIES THE CLEAR CONGRESSIONAL INTENT TO RELY ON STATE ENFORCEMENT STRATEGIES

This Court should grant the Petition for Writ of Certiorari not only because the decision below is contrary to the plain meaning of the CAA and conflicts with the decisions of this Court and other circuits, as documented by Petitioners in the Petition for Certiorari, but also because the EPA's insidious practice of overriding discretionary decisions of the States disrupts the federal-state partnership and undercuts the States' enforcement goals.

In the CAA, Congress recognized the preeminent role of the States in addressing air pollution:

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

42 U.S.C. § 7407(a).

The effect of this provision was clearly set out by this Court in *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975):

> The [EPA] is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under §110(a)(2), the Agency is required to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of §110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. §110(c). Thus, so long as the ultimate effect of a State's choice of emission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.

Id. at 79.

But notwithstanding the clearly stated deference the EPA is to give authorized States, the EPA seems to believe its mandate for cooperation evaporates once a State is certified. This is evident from the EPA's practice of nullifying state enforcement decisions, like Alaska's BACT determination in this case, to seek its own enforcement goals.

In their article, *The Federal and State Roles in Environmental Enforcement: A Proposal for More Effective and More Efficient Relationship*, 14 Harv. Envtl. L. Rev. 7

(1990), Hubert H. Humphrey and LeRoy C. Paddock recount the EPA's history of interfering with state enforcement efforts under numerous environmental laws, including the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act. Although the authors are focused on the practice of "overfiling," where the EPA sues a violator concurrently or subsequently to the state, the authors' conclusions apply equally to the present case where the EPA has nullified the State's enforcement strategy. Indeed, the EPA's unilateral issuance of an order to both the State of Alaska and Cominco, invalidating the State's permit, was a form of "overfiling." The power to veto a state permit decision and the power to file a separate federal lawsuit when the State has acted derives from the same source — EPA's assertion, upheld by the Ninth Circuit below, that the Agency is not bound by the enforcement decisions of the State under a federally-authorized environmental protection program.

According to the authors, one of whom was Attorney General of the State of Minnesota, unilateral enforcement by the EPA is disruptive to state enforcement programs in a number of ways. Primarily, it increases the reluctance on the part of regulated entities to deal only with state enforcement officials. Obviously, if EPA can usurp a State's decision making power, regulated entities cannot be certain that a permit decision, or compliance schedule, or a penalty amount agreed to by the State is final. One result is that States may find it harder to negotiate concessions with regulated entities. *Id.* at 13-14. At best, this is counterproductive. At worst, it unnecessarily delays the resolution of polluting activities to the ultimate injury of the people and the environment.

Another result of EPA's invasion of the State's enforcement authority is that it breeds distrust between federal and state enforcement officials. Indeed, the very act of "overfiling" or countermanding a State permit decision, as occurred in this case, is a breach of trust. Once a State is

authorized to enforce the federal program, the State stands in lieu of the EPA. This authorization is meaningless, however, if the EPA can override virtually any act of the State with which federal officials disagree. Moreover, this disagreement may not have anything to do with the State's substantive response to the environmental problem. So it was in this case.

ADEC concluded that "Low NOx" controls was BACT for the Red Dog Mine because it minimized emissions and was substantially more cost effective than other alternatives. The Ninth Circuit acknowledged this fact and the EPA has not shown otherwise. *See Alaska v. United States EPA*, 298 F.3d 814, 817 (9th Cir. 2002). Nevertheless, the EPA ordered ADEC and the mine to utilize a more expensive, perhaps even economically infeasible, but potentially less effective emission control technology. This action not only demonstrates the EPA's open disregard for the State's duly authorized air pollution program, but undermines Alaska's enforcement objectives.

Those objectives include demonstrating a concern for the local economy and encouraging permit applicants to go beyond regulatory requirements to improve air quality. When ADEC considered BACT alternatives for the Red Dog Mine, it expressed considerable concern for the potential loss of jobs that would result from the more expensive SCR technology the EPA preferred. According to ADEC, the Red Dog Mine caused a dramatic reversal in unemployment rates in the local borough:

> "Before the Mine opened in 1990, borough wages were well below state average wages .... The Mine now provides high paying year round employment. ... Cominco's contractors, vendors, and wages have boosted the borough's private sector economy.
>
> ... With government support and endorsement of Cominco's operations, including the Production Rate Increase Project, the Red Dog Mine will continue to influence and benefit the residents and economy of this region."

298 F.3d at 823.

ADEC also expressed concern that the use of SCR, rather than "Low NOx" controls, would hamper the mine's world competitiveness. *Id.* These are the very types of "economic impacts and other costs" the CAA expressly requires the State to consider in determining BACT. *See* 42 U.S.C. § 7479(3).

But beyond the economic considerations, the State took into account the overall goal of the CAA and the purpose of BACT, to minimize emissions, and authorized the use of "Low NOx" controls. Instead of the more costly and potentially less effective SCR, Cominco was willing to install "Low NOx" technology on all of the mine's generators, even those not subject to BACT requirements. Thus, the State was able to gain concessions from the Red Dog Mine it could not require by regulation and minimize emissions at the same time.

This Court recognized an analogous situation in a case called *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). In *Gwaltney*, this Court considered whether the citizen suit provision in the Clean Water Act authorized citizen suits for wholly past violations. The Court determined the Act did not confer such jurisdiction. Concluding that the citizen suit provision of the Clean Water Act was intended to support the government's enforcement program and not displace it, the Court suggested a hypothetical to make its point. Suppose, the Court said, the Administrator of the EPA identified a violator and issued a compliance order. *Id.* at 60. "Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Id.* at 60-61. "If citizens could file suit, months or years later, in order to seek the civil

penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Id.* at 61.

But that is the case here. If the EPA can invalidate a state enforcement decision with which it disagrees, as the lower court held, to pursue its own enforcement goals, then the State's discretion to enforce the CAA in the public interest would be curtailed considerably.

Demonstrating a concern for the local economy and encouraging permit applicants to go beyond regulatory requirements to improve air quality are both laudable and legitimate state enforcement objectives. But EPA's invalidation of ADEC's permit decision undermined the State's enforcement program by advancing federal goals that are inconsistent with the State's goals. Moreover, the EPA's nullification of Alaska's enforcement strategy harms the local community and, ironically, the environment.

Under the CAA, the State receives federal authorization only after satisfying the EPA that the State program meets all federal standards for implementation, maintenance, and enforcement. *See* 42 U.S.C. § 7410(a)(1). Alaska met these exacting standards and received state authorization from the EPA. At no time in this case has the EPA questioned the State's fitness to keep its State authorization or threatened sanctions against the State for failure to meet federal air pollution standards, although the EPA has the power to impose sanctions, including the suspension of federal highway moneys. *See* 42 U.S.C. § 7509. At root, the EPA's only objection stems from the EPA's preference for a more costly, but less effective, control technology than the State of Alaska selected. Since the State's selection would have minimized emissions, it defies common sense and the clear purpose of the Act to allow the EPA to interfere with the state's enforcement strategy. Therefore, the Petition for Writ of Certiorari should be granted.

II

THE PETITION SHOULD BE GRANTED BECAUSE THE IMPOSITION BY EPA OF AN INDEPENDENT AND CONFLICTING ENFORCEMENT STRATEGY IS CONTRARY TO THE REGULATORY SCHEME ADOPTED BY CONGRESS TO PROMOTE STATE RESPONSIBILITY FOR CLEAN AIR AND IS COUNTERPRODUCTIVE TO THE GOALS OF THE CAA

In his article, *State/Federal Enforcement of the Clean Air Act and Other Federal Pollution Laws: Federal Overfiling on State Enforcement Proceedings*, 1987 B.Y.U.L. Rev. 1085, Steven Cook examines the practice of "overfiling," and by implication EPA nullification of other state enforcement decisions, such as Alaska's BACT determination in this case. He concludes that, on balance, EPA interference with state enforcement strategies does not help the agency achieve its goals of deterrence, fair and equitable treatment of the regulated community, and rapid resolution of environmental problems.

Cook identifies three main problems with EPA interference with state environmental enforcement. First, subsequent negotiations with the EPA over conditions or penalties can delay resolution of environmental problems. *Id.* at 1095. Second, EPA interference discourages cooperation between the public and the States because of the knowledge that whatever the State decides the EPA may have to be satisfied later. *Id.* at 1096. And third, EPA interference undermines state credibility with the public because the regulated community cannot rely on state permit or other enforcement decisions. *Id.*

The bottom line for Cook is that

> [f]ederal efforts merely duplicate the state's actions by requiring [the regulated entity] to go through a

> second set of negotiations. This new round of negotiations usually produces no additional benefit to the environment.

Id. at 1095.

This is certainly born out in the present case where Cominco must now go through separate permit negotiations with the EPA. And, as Cook suggests, this new round of negotiations is unlikely to produce any additional benefits to the environment as "Low NOx" controls provide the greatest potential for overall emission reductions.

In summary, Cook maintains that when EPA invades the State's enforcement authority it fails to acknowledge the needs and goals of the state program, the regulated public is treated unequally, and resolution of environmental issues is delayed because the State's credibility is eroded. He suggests, moreover, that EPA's goals can be better accomplished through increased cooperation with the States. *Id.* at 1101. Humphrey and Paddock agree. They conclude that when the EPA overrides the States it results in redundant enforcement efforts, introduces uncertainty into the state enforcement program, saps the limited enforcement resources of state and federal agencies, undermines and disrupts the federal-state working relationships, and conflicts with the historical role of the State in addressing environmental problems. *Roles in Environmental Enforcement*, *supra* at 39.

> Twenty years ago, one of the main reasons for an increased federal role in environmental protection was the inadequacy of state programs, including state enforcement. Today, allowing states and, in some cases, local governments, to reassume a greater enforcement role may be the only way to ensure an effective enforcement presence among the tens of thousands of regulated entities that now exist in each state. Strong, well-focused enforcement efforts

> designed to address the varying types of regulated entities in each state are necessary to obtain high levels of voluntary compliance without which the vast regulatory programs will not succeed.

Id. at 36-37.

CONCLUSION

When the EPA invalidates a State's enforcement decision because it would have exercised its discretion differently, it creates distrust between federal and state officials, erodes confidence in state decision-making, nullifies the State enforcement strategy, and is counterproductive. In short, EPA interference with state enforcement efforts, including state BACT determinations, undermines the role of the States, recognized in the CAA, as primary enforcers of federal ambient air quality standards.

For these reasons, this Court should grant the Petition for Writ of Certiorari and overturn the decision below.

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